GEORGIA RIPARIANISM AND IRRIGATION

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Abstract. This paper will discuss the current state of riparian rights in Georgia, particularly in the irrigation context. There will be a discussion of the history of the riparian doctrine, including its origins and application in Georgia. The paper will then discuss fully the Pyle v. Gilbert decision, exploring the extensions that the Georgia Supreme Court has made in Georgia's riparian law. This will lead to a conclusion that the dramatic alterations in the riparian doctrine may have frustrated its original purposes.

TRADITIONAL RIPARIANISM

The riparian doctrine is an old concept. Under the Institutes of Justinian, running water, like wildlife, could not be possessed, but could be used beneficially by all.[1] English courts, when confronted with disputes over competing water uses, applied the maxim sic utero tuo ut alienum non laedas; a person should use his property in a manner that does not injure the property of another.[2] As one English court stated, "Every proprietor has an equal right to the use of the water which flows in the stream; and consequently, no proprietor can have the right to use the water to the prejudice of any other proprietor."[3] This is commonly referred to as the natural flow theory of the riparian doctrine.

Explaining the riparian's right to use the water in the stream, and the penalty for withdrawing too much water, English legal scholar J. B. Phear wrote:

> Although a riparian cannot permanently divert water from the stream, he is not restricted from using it within his own bounds for irrigation, or from otherwise temporarily diverting it in any other way, provided he finally returns it to his neighbour by the old channel: he may even consume it, otherwise than for domestic purposes, and by the mouths of his cattle, as long as he does so reasonably, and without producing sensible diminution in the stream. It cannot be laid down in the abstract what constitutes a sensible diminution; this must depend upon the circumstances in each case; probably a diminution of one-fifth would always afford a good ground of action to the inferior proprietor; but it must be remembered that, whatever be the legitimate usufruct in any case, the moment it is exceeded by any proprietor, a cause of action accrues to his neighbour, whether the latter be actually injured by such excessive user or not.[4]

Thus, under English riparian law, the riparian had the right to use the water, but when that use unreasonably diminished the water flow, the downstream riparian had a cause of action, regardless of whether there was actual injury.

In regards to irrigation, Phear states that the farmer "may make trenches to conduct the water to irrigate his land, if he returns it with no other loss than that which irrigation caused."[5] In the 19th century, irrigation was accomplished through the use of canals, such that the water might be used to irrigate and then returned to the stream with no other diminishment than that caused by "absorption and evaporation."[6] That should be compared to modern irrigation, performed by complex and expensive machinery, which, if used

[1] The Institutes of Justinian state: "Et quidam naturali jure communia sunt omnium hæc, aer, aqua profluens, mare, et per hoc littora maris," which translates to: "Things common to mankind by the law of nature, are the air, running water, the sea, and consequently, the shores of the sea." J. Inst. 2.1.1 (Thomas Cooper trans. 2d ed. 1841).

[2] *See* J.B. Phear, Rights of Water, at 16 (1859), *see also* Black's Law Dict. 1380 (6th ed. 1990).

[3] Wright v. Howard, 1 S. & H. 190, *quoted in* Phear, *supra* note 13, at 20,21.

[4] Phear, *supra* note 13, at 24-27.

[5] *Id.* at 26.

[6] *Id.*

properly, by misting only as much water onto the crop as can be efficiently absorbed, is one hundred percent consumptive, returning little or no water to the stream.[7]

Traditional riparianism also limited water use to riparian land. Courts accomplished this by using variously four restrictive tests. First, riparian land must obviously have physical contact with the watercourse.[8] This is the physical contact test. Second, some courts have applied a watershed test, under which riparian rights can only be exercised for the benefit of land within the watershed.[9] Even if land satisfied the physical contact test, any contiguous property outside of the watershed would not be considered riparian land. This ensures that any water withdrawn but not consumed will benefit the watershed and return to the watercourse through the hydrologic cycle.[10]

The third and fourth tests use legal concepts to further limit the extent to which land is considered riparian. Under the single transaction test, land not physically touching the watercourse must have been acquired at the same time as the land bordering the stream.[11] "The practical effect of this single transaction requirement is to limit riparian land to the smallest area held by a party under a chain of title including the land adjoining the watercourse."[12] The unitary tract test has a similar function but is less restrictive than the single transaction test. The unitary tract test requires that the riparian property be considered under community standards as being a single tract of land.[13]

These restrictions dramatically limit the exercise of riparian rights. The restrictions benefit the watershed environment by helping to ensure that water will be used and remain within the watershed. They act to maximize the value of land that satisfies the riparian requirements by limiting the number of users. This gives riparians an incentive to protect their interests and the stream itself. On the other hand, these restrictions have been criticized as being inefficient and arbitrary.[14] Land within the watershed may be deprived of the benefit of water use merely because of fictional boundaries created by legal title.[15] In situations where water is plentiful, otherwise reasonable uses may be denied without any obvious benefit to the watershed.

THE DEVELOPMENT OF RIPARIANISM IN GEORGIA

In 1848, the Georgia Supreme Court in Hendrick v. Cook[16] adopted the natural flow theory of riparian law rather than appropriation law (commonly applied in western states). Hendrick was an action in trespass maintained by a plaintiff mill operator against a defendant who had constructed a dam across a stream upon which both parties were riparian. The effect of the dam was to stop the flow of the stream. Though the water did not exceed its normal channel, its level above the dam raised ten inches, and was stagnant, such that it would not turn the plaintiff's mill wheel.[17] The court defined the riparian doctrine in the following manner: "Each proprietor of the land in the banks of the creek, has a natural and equal right to the use of the water which flows therein as it was wont to run, without diminution or alteration. Neither party has the right to use the water in the creek, to the prejudice of the other."[18]

Furthermore, the Hendrick court announced that a riparian has a right to a reasonable use of the water, including for domestic, agricultural, and manufacturing purposes, "provided, that in making such use, he does not work a material injury to the other proprietors."[19] Applying that rule, the court found that the defendant's dam, though it did no actual damage to the plaintiff's mill, did prevent the plaintiff from exercising his right to reasonably use the water. The court found that the plaintiff was entitled to recover nominal damages, even if there was no actual injury, in order to protect his rights.[20]

Reasonable use under English law referred to the quantity of water used rather than the purpose the water was used for. Any use that noticeably diminished the flow would give rise to a cause of action, regardless of any actual injury. For the most part, the Hendrick court followed that reasoning. The difference lies in the reasonable use language.

Under Hendrick, certain uses are considered reasonable so long as they do not invade other riparians' right to use. These are domestic,

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[7] *See* Kundell, *supra* note 11, at 13.
[8] *See* Lynda A. Butler, *Allocating Consumptive Water Rights in a Riparian Jurisdiction: Defining the Relationship Between Public and Private Rights*, 47 U. Pitt. L. Rev. 95, at 109.
[9] *See id.* at 111.
[10] *See id.* at 112.
[11] *See id.* at 117-118.
[12] *Id.* at 118.
[13] *See id.* at 121-122.
[14] *See generally id.*
[15] *See id.* at 120.
[16] 4 Ga. 241 (1848).
[17] *Id.* at 257, 258.
[18] *Id.* at 256.
[19] *Id.*
[20] *See id.*

manufacturing, and irrigation uses. Domestic uses are consumptive, but only on a de minimis level; a household can only take out so much water for personal use. Similarly, the primary manufacturing use in the nineteenth century was for turning mill wheels, which was generally not consumptive at all.[21] Finally, as noted previously, traditional canal irrigation was only consumptive to the extent that water was absorbed or evaporated. The Georgia view is more utilitarian than the English view, allowing for greater exploitation of the water resource. At the same time, the Hendrick rule still does not allow for overly consumptive uses.

The Georgia Supreme Court considered the parameters of reasonable use in Price v. High Shoals Manufacturing Company, 132 Ga. 246, 64 S.E. 87 (1909), where the issue was whether the defendant upstream company's machinery was too large for the stream. The defendant had constructed a dam across the stream in order to form a reservoir to provide water resources for a substantial increase in its manufacturing machinery.[22] The dam was closed at night, with the result that the plaintiff downstream riparian was deprived of the flow of the stream until noon each day, and until the stream reached full flow, the plaintiff could not operate his mill.[23] The court held that reasonable use was a jury question, and listed some of the factors that the jury could use to determine if the use was reasonable:

> What is a reasonable use is a question for the jury in view of all the facts in the case, taking into consideration the nature and use of the machinery, the quantity of water used in its operation, the use to which the stream can be applied, the velocity of its current, the character and size of the watercourse, and the varying circumstances of each case.[24]

This indicates that whether a use is reasonable is a fact question requiring consideration of both the reasons for the use and the degree of flow alteration the use creates.

The Georgia Supreme Court considered the riparian land restriction in two principal cases. In City of Elberton v. Hobbs, 121 Ga. 749, 49 S.E. 779 (1905), the city of Elberton purchased land adjacent to a non-navigable stream to withdraw water for municipal use. The withdrawal reduced the level of flow such that a downstream riparian, who operated a mill, could not operate her business. She sued to either enjoin the city's withdrawal or to win compensation for the taking of her riparian right. The court first held that riparian law did not give the municipality the right to withdraw the water for non-riparian uses. Furthermore, the court held that if the municipality's actions invaded a riparian's right to reasonably use the flow of a stream, there was a taking:

> The right of the owner of land through which a non-navigable stream flows to have its waters come to his land in the natural and usual flow is inseparably annexed to the soil and is parcel of the land itself, and comes within the protection of the constitutional provision which forbids the taking of private property for public purposes, without just and adequate compensation being first paid.[25]

The Georgia Supreme Court relied on City of Elberton in Hendrix v. Roberts Marble Company, 175 Ga. 389, 165 S.E. 223 (1932). In Hendrix, an upstream riparian had sold his water rights to a non-riparian factory, the plaintiff. The defendant, a downstream riparian marble factory, in a cross-motion to the plaintiff's complaints, sought to enjoin the plaintiff from diverting water from the stream. In affirming the grant of an injunction, the court held that non-riparians could not acquire riparian rights.

> The court is of the opinion that under the law riparian rights are appurtenant only to lands which actually touch on the watercourse, or through which it flows, and that a riparian owner or proprietor can not himself lawfully use or convey to another the right to use water flowing along or through his property, upon non-riparian lands or lands physically separated from the lands bordering upon the stream.[26]

In the cases above, the Georgia Supreme Court adopted riparianism, but in a form distinguishable from natural flow riparianism. Georgia riparians are allowed

[21] *See* A. Dan Tarlock, *Reconnecting Property Rights To Watersheds*, 25 Wm. & Mary Envtl. L. & Pol'y Rev. 69, at 89 (2000).
[22] *See* Price at 132 Ga. 247, 64 S.E. 88.
[23] *See* Price at 132 Ga. 248, 64 S.E. 88.
[24] Price at 132 Ga. 248, 64 S.E. 89.
[25] Elberton, syllabus.
[26] Hendrix at 175 Ga. 394, 165 S.E. 226.

to diminish the flow of the stream for reasonable purposes. The English reasonable use applied to the amount of diminishment. Under Georgia riparianism, whether or not a use is reasonable is determined by balancing the amount of water used and the purpose. City of Elberton and Hendrix required the use to be by a riparian for the benefit of riparian land, physically contacting the stream. A riparian has an immediate cause of action if there is a diversion affecting the natural flow of the stream. However, if that diversion is by a riparian, and is for a reasonable use, then the diversion will not be enjoined unless the plaintiff is materially injured, either through actual damage, or through the obstruction of the plaintiff's riparian rights.

RECENT COURT DECISIONS AND GEORGIA RIPARIANISM

In 1980, the Georgia Supreme Court heard Pyle v. Gilbert, 245 Ga. 403, 265 S.E.2d 584 (1980). This case may be an example of the maxim hard cases make bad law. In Pyle, the plaintiff sought to enjoin the withdrawal of water from a small tributary of the Chattahoochee River for irrigation of several farms in Early County. The plaintiff wished to rebuild and open a gristmill that had burned down, but the upstream withdrawal diminished the stream flow to a level that made the mill inoperable.

In earlier cases, on similar facts, the court had ruled that the plaintiff had a right to reasonably use the stream flow, and the defendant could not reduce the flow to a degree that prevented the plaintiff from exercising that right.[27] Those cases, however, are more than one hundred years old, and gristmills are now anachronisms. In contrast, the farms that were withdrawing for irrigation were commercial operations that used irrigation to produce agricultural products. The case arose in the area of Georgia where agriculture is the most significant land use, and where surface water is the principal water source for large withdrawals. The Georgia Supreme Court would go on to rule for the defendants, and in doing so, substantially change Georgia's application of the riparian doctrine.

To understand the Supreme Court's decision, it is necessary to discuss the posture of the case on appeal. The trial court had made several rulings, which the Supreme Court would overturn. First, the trial court made a preliminary ruling that the diversion for irrigation was an invasion of the plaintiff's riparian rights, and unreasonable as a matter of law.[28] In making that ruling, the trial court relied on findings of fact as to the defendants' combined withdrawal and the diminishment in the flow of the stream.[29] The trial court also found that the diversions were improper because the water was used to irrigate non-riparian farms. One of the farmers, in fact, was not a riparian, but had acquired permission to irrigate from an upstream riparian.[30]

The Georgia Supreme Court first explained that irrigation was a traditional use under the agriculture provision of the reasonable use exception.[31] The court cited the law of Hendricks as initial support.[32] The court also relied on Georgia legislation, which is based closely on the case law discussed above.[33] The court cited Georgia's Water Quality Control Act (Ga. L. 1977, p. 368), which exempted farm uses from water withdrawal permitting requirements.[34] The court also emphasized some utilitarian language from Price:

> If the general rule that each riparian owner could not in any way interrupt or diminish the flow of the stream were strictly followed, the water would be of but little practical use to any proprietor, and the enforcement of such rule would deny, rather than grant, the use thereof.[35]

The court did not discuss the changed nature of agricultural irrigation from the time at which the reasonable use exception was developed. The court found that the reasonable use exception included

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[27] *See* White v. The East Lake Land Company, 96 Ga. 415, 23 S.E. 393 (1895).

[28] *See* Pyle at 245 Ga. 404, 265 S.E.2d 585.

[29] *Id.* at 245 Ga. 408-409, 265 S.E.2d 588.

[30] *Id.* at 245 Ga. 404, 265 S.E.2d 586.

[31] *Id.* at 245 Ga. 407, 265 S.E.2d 587.

[32] *Id.* at 245 Ga. 404-405, 265 S.E.2d 586.

[33] *Id.* at 245 Ga. 405-406, 265 S.E.2d 586-587.

[34] *Id.* at 245 Ga. 408, 265 S.E.2d 588. It should be noted that currently O.C.G.A. § 12-5-31 (2000) does not exempt all farm uses, but rather withdrawals to create impoundments for farm uses. Withdrawals over 100,000 gallons per day must be permitted pursuant to O.C.G.A. §12-5-31. Furthermore, O.C.G.A. § 12-5-31(a)(3) provides specifically for the permitting of irrigation withdrawals in order to "ensure the applicant's right to a reasonable use of such surface waters" in the future. This provision reflects the concern of farmers that, though the exemption from permitting requirements may have reduced red tape, it may not have protected their future rights to irrigate against other permitted uses. *See* Adron Harden, *Agricultural Water Use: Concerns*, Georgia Water Resources—Issues and Options, 54 (James E. Kundell ed. 1980).

[35] Price at 132 Ga. 248-249, 64 S.E. 88, *quoted in* Pyle at 245 Ga. 406, 265 S.E.2d 587.

agriculture, and that the courts and the legislature contemplated irrigation as an agricultural use. Therefore, the court held that the issue for the trial court was whether the plaintiff suffered material injury from the irrigation, and that this was to be determined by the jury, rather than the trial judge.[36]

The court then considered the issue of non-riparian use, finding that riparian rights should not be restricted only to riparians. Unfortunately, the court gave this issue little discussion, considering the considerable degree of change it would make in Georgia's riparian law. The court cited a 1955 study that stated: "Another disadvantage of this [riparian] doctrine is that it permits the use of stream water only in connection with riparian land."[37] The purpose of that study was to formulate a more economically efficient means of controlling the use of the state's water resources. It does not consider the importance of maintaining stream flow and the role of the riparian doctrine in protecting the Georgia's environment.

The court also considered the recommendation of the American Law Institute (ALI), as expressed in the 2d Restatement of Torts §855, which advocates the extension of riparian rights to non-riparian users. The ALI's position is based on two arguments: first, that riparian rights are property rights, and should be treated like other property rights; and second, that such a change allows for more utilitarian use of water resources.[38]

Having decided to overhaul the riparian doctrine, the Georgia Supreme Court distinguished Elberton to apply only to the condemnation of riparian rights.[39] The court ignored the fact that in Elberton, if that court had not ruled that the municipality could not exercise riparian rights on non-riparian land, then there would have been no issue of condemnation or taking. The Pyle court flatly overruled Hendrix.[40]

In 1982, the Georgia Supreme Court revisited the issue of riparian irrigation in Stewart v. Bridges, 249 Ga. 626, 292 S.E.2d 702 (1982). In Stewart, all of the parties had bought land bordering a man-made lake in a planned subdivision. The defendant bought property adjacent to the lake that was contiguous with a farm he already owned. He used water from the lake to irrigate the adjoining farm. The plaintiffs, other landowners around the lake, sued to enjoin the defendant from using the lake for irrigation. The court determined that parties owning lake front land had rights to the water in the lake in its entirety and were subject to the riparian servitude without respect to upstream or downstream flow.[41] Having found that riparian law applied, the court cited Pyle v. Gilbert for support that it was proper for the defendant to exercise his riparian rights for the benefit of non-riparian land.[42] The court did not discuss the reasoning or validity of that rule.

In Pyle, the interpretation of reasonable use was extended to include irrigation as a traditional reasonable use. The possible flaw in this is that the traditional uses were either non-consumptive or consumptive only on a de minimis level. Modern irrigation, conversely, can be highly consumptive. Furthermore, riparian rights are no longer restricted to riparians or riparian land. While the restriction to riparian land has been criticized, it serves the environment by giving incentives to riparians to guard the stream flow to protect their own property values, and by helping to ensure that water that is withdrawn benefits the watershed.

CONCLUSION

The reasoning of Pyle v. Gilbert focuses on economically efficient use of water resources. It does not consider protection of the watershed environment. By extending the reasonable use exception to include irrigation, the court may have undermined riparians' ability to protect their riparian rights and the watercourse itself. In striking the restriction that riparian rights not be exercised for non-riparian uses, the Court ignored the restriction's purpose of maintaining the integrity of the watercourse and watershed. It would be advisable to reconsider the extension and alteration of the riparian doctrine in light of the effects on Georgia's environment and economy.

[36] Pyle at 245 Ga. 409, 265 S.E.2d 588.
[37] The Institute of Law and Government of the Schhol of Law, The University of Georgia, A Study of the Riparian and Prior Appropriation Doctrines of Water Law, 104 (1955), *quoted in* Pyle at 245 Ga. 410, 265 S.E.2d 589.
[38] *See* Restatement (Second) of Torts § 855 & §856 cmt. b.
[39] *See* Pyle at 245 Ga. 410, 265 S.E.2d 589.
[40] *See id.*
[41] *See* Stewart at 249 Ga. 627, 292 S.E.2d 704.
[42] *See id.*